UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDWARD R. BURKE, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER BN07529102771I1 DATE: MAR 25 1992

Robert F. O'Neill, Esquire, Burlington, Vermont, for the appellant.

Bonnie Edwards, Esquire, Department of the Treasury, New York, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision dismissing his appeal for lack of Board jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order,

still finding that the Board lacks jurisdiction over the appeal.

BACKGROUND

The appellant was a GS-1811-13 Group Manager in the Criminal Investigative Division of the Internal Revenue Service's (IRS's) Burlington District Office. He was supervised directly by the Burlington District Director until sometime in January 1989 when, due to a reorganization, the appellant came under the immediate supervision of John Ehlen, the Chief of the Criminal Investigative Division in Albany, New York.

On January 23, 1989, the appellant requested reassignment from his Group Manager position to a position as Special Agent, and his request was granted. *See* Appeal File (AF), Tab 8, Subtab 4P. On February 3, 1989, he requested that he be returned to his former position based upon his fear that the Special Agent position would eventually be downgraded to GS-12; the request was denied. *See id.*, Subtabs 4N and 4L. On March 26, 1989, the appellant filed a formal complaint of discrimination based upon his age in connection with the reorganization. *See* Complaint, *id.*, Tab 14, Attachment to Appellant's Hearing Ex. 6. A vacancy announcement for the appellant's former Group Manager position was issued, and, although the appellant applied for it, he was not selected. He filed another formal discrimination complaint concerning the matter. *See id.*, Narrative Response at 4.

Thereafter, the appellant began using extensive sick leave and was placed on sick leave restriction. *See id.*, Subtab 4K. This action engendered another discrimination complaint. The appellant did not return to work after April 7, 1989. *See id.*, Subtab 4Q. On December 28, 1990, he retired. *See id.*, Subtab 4A. The appellant subsequently filed a formal complaint of discrimination alleging that he was forced to retire. *See id.*, Subtabs 3 and 4C. In this connection, the appellant alleged that he was discriminated against on the basis of age and as reprisal for filing past complaints and thus was constructively discharged. The agency consolidated this discrimination complaint with other discrimination complaints the appellant had filed, and it subsequently issued a final decision finding no discrimination. *See* AF, Tab 1, Attachment. This timely appeal followed.

The appellant alleged in his petition for appeal that his retirement was involuntary because of coercion based upon age discrimination, reprisal for having filed discrimination complaints, and harassment by his immediate supervisor, John Ehlen, in connection with the events and matters described above. He also alleged reprisal for whistleblowing activities. *See* AF, Tab 1.

In his initial decision, the administrative judge found that the appellant had failed to set forth nonfrivolous allegations that, if proven, were sufficient to cast doubt on the presumption of voluntariness, and he therefore declined to

hold a hearing. Further, he found that the appellant's retirement was voluntary, and that the Board lacked jurisdiction over the appeal. Because he found that the Board lacked jurisdiction, he declined to address the appellant's allegations of age discrimination and reprisal for filing complaints, other than in connection with determining whether the appellant was coerced into involuntarily retiring. The administrative judge did not mention the appellant's whistleblowing allegation.

In his petition for review, the appellant reiterates his claim that his retirement was involuntary based upon age discrimination, reprisal for his having filed discrimination complaints and for his whistleblowing, and harassment by Ehlen from January 1989 through December 28, 1990.[1]

ANALYSIS

Based upon our review of the record, we find that the administrative judge correctly concluded that the jurisdictional issue could be resolved without a hearing because, even assuming the truth of the appellant's assertions, those assertions did not show that the retirement was involuntary. *See Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed. Cir. 1986).

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[1] The appellant stated that his attorney would be submitting specific exceptions to the initial decision. To date, however, we have received no further submission from the appellant or his attorney, and there has been no request for an extension of time to file such a submission.

In finding that the Board lacked jurisdiction over the appeal, the administrative judge correctly set forth and applied the tripartite test for coercion, i.e., that: (1) One side involuntarily accepted the terms of the other; (2) circumstances presented no other alternative; and (3) those circumstances were the result of coercive acts of the opposite party. *See, e.g., Barthel v. Department of the Army*, 38 M.S.P.R. 245, 251 n.11 (1988). The Board has held that it is proper for an administrative judge to consider an allegation of discrimination in an appeal of an allegedly involuntary resignation "for the limited purpose of determining whether it supported the appellant's allegation of coercion." *Day v. Department of Housing & Urban Development*, 50 M.S.P.R. 680, 684 (1991). *See also Price v. United States Postal Service*, 50 M.S.P.R. 107, 110 (1991) (the Board may make an initial determination on a claim of prohibited discrimination where that claim is asserted as the sole cause of an involuntary action).

The administrative judge also acted properly in ruling that, where an appellant alleged that his retirement was coerced by discrimination and by reprisal for filing discrimination complaints, the appellant was required to show that his working conditions were made so intolerable by the alleged discrimination and reprisal that the employee was "forced" into an involuntary resignation or retirement. *See* I.D. at 12-13; *Bartman v. Allis-Chalmers Corporation*, 799 F.2d 311, 314 (7th Cir. 1986), *cert. den.*, 107 S. Ct. 1304 (1987);

Collins v. Argonne National Laboratory, 757 F. Supp. 934, 937 (N.D. Ill. 1991). If the appellant makes this showing, there has been a constructive discharge because he has been left with no alternative but to leave the place of employment through resignation or retirement. *See id.*; *see also Johnson v. Department of the Army*, 20 M.S.P.R. 571, 573 (1984) (appellant who failed to show that working conditions were so intolerable that he was forced to retire failed to establish that his retirement was coerced as a result of alleged discrimination and reprisal), *aff'd*, 758 F.2d 664 (Fed. Cir. 1984) (Table), *cert. denied*, 471 U.S. 1102 (1985).

In this case, as the administrative judge found, the appellant failed to return to work even after he was advised in April 1990 that Ehlen, the official allegedly responsible for discriminating against the appellant and for retaliating against him for filing discrimination complaints, was no longer serving as his supervisor. *See* I.D. at 12 & n.1; AF Tab 8, Subtab 4K.[2] As the administrative judge further noted, the agency specifically advised the appellant in October 1990 that he had a right to withdraw the retirement application he had submitted, if he chose to do so. *See* I.D. at 11; Letter of Oct. 10, 1990, AF Tab 8, Subtab 4D. The appellant nonetheless retired on December 28, 1990, without making any attempt to withdraw the application. Thus, even if Ehlen

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[2] Ehlen had been assigned to a position that had "no line authority" over the appellant's position. AF, Tab 8, Subtab 4K, Letter from J. Cross to appellant, Apr. 11, 1990.

engaged in the discriminatory and retaliatory activities the appellant has attributed to him, the appellant has not shown that those activities coerced his retirement.

As we have indicated above, the appellant also has alleged that his retirement resulted in part from retaliation for his whistleblowing. Allegations such as this, when made in support of an assertion that the agency coerced the appellant's resignation or retirement, should be considered in the same manner as allegations that the coercion was based on discrimination. That is, the administrative judge should consider them only for the limited purpose of determining whether they support a finding of coercion. *Cf. Day*, 50 M.S.P.R. at 684; *Price*, 50 M.S.P.R. at 110.

The appellant has not identified the whistleblower activity in which he allegedly engaged, nor has he otherwise shown how his retirement could have resulted from retaliation from this alleged activity. The mere allegation that Ehlen retaliated against him for whistleblower activities is insufficient to raise a nonfrivolous allegation that his working conditions were made so intolerable by the alleged retaliation as to render his retirement involuntary by reason of coercion. Accordingly, the appellant has not shown that he is entitled to a hearing on this issue. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985).[3]

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[3] For this reason, while the administrative judge erred in failing to specifically address this allegation in connection with the issue of coercion, the error was not prejudicial to

For the reasons stated above, we agree with the administrative judge that the appellant has failed to rebut the presumed voluntariness of his retirement and that the Board therefore lacks jurisdiction over the appeal. *See Koop v. Federal Emergency Management Agency*, 16 M.S.P.R. 605, 607 (1983), *modified in part on other grounds*, *Talley v. Department of the Army*, 50 M.S.P.R. 261 (1991).[4]

ORDER

This is the final decision of the Merit Systems Protection Board in this appeal. *See* 5 U.S.C. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

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the appellant's substantive rights. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

[4] The appellant argues for the first time in his petition for review that he was deprived of certain information. Because he has not shown that this argument is based on new and material evidence not previously available despite due diligence, we need not consider it. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.